

MEMORIAL

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The Trustees for the Creditors of *Robert Brown*,
Esq; late Lord Provost of *Edinburgh*, and others,
Creditors of the Estate of *Langton*,

A G A I N S T

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The Hon. *Henry Home* of *Kaims*, Esq; one of the
Senators of the College of Justice, and others,
also Creditors of said Estate.

BEFORE the Year 1746, an erroneous Rule, in the
Ranking of Creditors upon a Bankrupt Estate, had, for
the most Part, prevailed, viz. That, where the Estate
stood charged with sundry Annualrents, or other real
Rights, which were all equally struck at by Inhibitions, the
Inhibitors were made to draw their Payments equally and pro-
portionally out of all the Annualrent-rights ranked *primo loco*,
in their Order, according to the Priority of their Insestments,
by which Means it frequently happened, that the preferable
Annualrenters fell short of their Payment, though there was
Sufficiency of Fund, both for paying them and the Debts, up-
on which the Inhibitions had followed.

This Rule was challenged in the Ranking of the Creditors
of the Estate of *Whitchaugh*. It was insisted, upon the Part of
the first Annualrenter, that the inhibiting Adjudgers ought
to draw their Payment out of the first and readiest of the Price,
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and that the Annualrent-rights should be ranked upon the Remainder of the Price, in their due Order, according to the Priority of their Investments, whereby any Deficiency or Shortcoming of the Fund, corresponding to what the Inhibitors drew, would fall upon the last, or least preferable Annualrenter, who, neither in Law nor Equity, was intitled to any Share of the Price, until the prior and preferable Annualrenters were satisfied and paid of their full Debts.

This Question was reported to your Lordships upon very elaborate Memorials, formed by the most experienced Accountants, who took different Sides in that Question; and as it was understood that the Rule established by your Lordships, in that Case, would fix this Point in all subsequent Rankings, in Cases of the like Nature, a Hearing in Presence was appointed, and the Judgment of the Court was, " That the
" Inhibition being prior to, and therefore affecting all the
" Annualrent-rights, the Deficiency arising from the Short-
" coming of the Funds, does not affect equally, or *pro rata*,
" all the Annualrenters who stand preferred, one to the other,
" but must affect the least preferable." And as this Interlocutor was adhered to, upon advising a very elaborate reclaiming Petition, the Rule thereby established has been uniformly followed in all the Rankings that have occurred since that Time.

Notwithstanding of which, this Question is now revived in the Ranking of the Creditors of the Estate of *Langton*; and the Lord *Shewalton*, Ordinary, having taken the Point to report, this Information is humbly offered on the Part of the preferable Annualrenters, in support of the Rule established by your Lordships Judgment, in the aforesaid Case of *Whitehaugh*.

The Principles of Law and Equity, upon which that Rule stands established, are obvious and plain, 1st, That the Will of the Letters of Inhibition, and the manifest Scope and Tendency of that prohibitory Diligence, is not simply to restrain



strain the inhibited Person from contracting Debts, or the Lieges from having any Intercourse with the Person so inhibited, but in so far as a Prejudice may be thereby done to those prior Debts upon which the Inhibition is raised; and therefore, that in all other Respects, the posterior Creditors fall to be ranked, and draw their Payment out of the remaining Part of the Price, as if there had been no Inhibitors, whereby any Deficiency, or Short-coming of the Fund must fall upon the last, or least preferable Infestment of Annualrent.

2dly, That as these Inhibitions operate no Prejudice to the Debts contracted prior to the Inhibition, and therefore are intitled to draw as if no Inhibitions had been used, so neither of these Inhibitions do operate any Benefit or Advantage to the posterior Debts in the Ranking amongst themselves.

3dly, That as the Inhibiter is not intitled to challenge the Deeds of the inhibited Person, any further than he can qualify that he sustains a Prejudice by the Debts contracted, posterior to his Inhibition, he has no Title or Interest to interfere in the Ranking of the other Creditors. The Inhibition secures his Preference, whereby he draws his Payment out of the first and readiest of the whole Fund, and being thus out of the Field, he has no Concern in the Ranking of the other Creditors; he sustains no Prejudice by the first Annualrent, if the Fund is sufficient for Payment of his Debt, though, by means of his Preference, there does not remain a Sufficiency of Fund for Payment of the whole Annualrenters, which Short-coming, or Deficiency, will therefore fall upon the last Annualrenter.

4thly, That the contrary Rule would be destructive of that Security arising from the Records, upon the Faith of which the Subjects of this Country have hitherto believed they might safely rely. If an Inhibition for any Sum, however small, against the most opulent Estate, was to have so strong an Effect as to prohibite the Lieges from all Intercourse with the inhibited

inhibited Person, or from lending their Money upon heritable Security, though their Debtor's Estate was apparently sufficient to pay both the Debts upon which the Inhibition followed, and the posterior Debt for which the first real Security was granted; and therefore, that it was absurd to suppose, that a Creditor who had lent his Money, and had got an Infeftment for Security thereof, upon an Estate, which, from the Records, he saw was liable to no prior Incumbrance, but an Inhibition for a small Sum, and who had thus secured himself by all the Forms the Law could devise, should nevertheless be prejudged by the after Contractions of other Creditors, or by the posterior Infeftment of Annualrent granted to them.

5thly, That the prior Infeftment upon Record, had, by Force of the Law, the same Effect against the posterior Infeftments, as the Inhibition had with respect to all the Debts contracted posterior to that Inhibition; and therefore, that as the Inhibiter was intitled to draw his Payment out of the first and readiest of the Price, whereby the Remainder of that Price would be the Fund of Payment for the other Creditors, and as the first Annualrenter had the same Plea of Preference, both in Law and Equity, to the posterior Annualrenters, who had lent their Money with their Eyes open, when, from the Records, they saw a prior Infeftment of Annualrent, any emergent Loss arising from the Deficiency of Fund, must fall upon the least preferable Infeftment of Annualrent.

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case These Principles apply to the Case stated, in the most simple View, viz. where the Inhibitions are supposed to be of Date prior to all the Infeftments of Annualrent, whereby the Operation, or Effect of those Inhibitions, in making out the Scheme of Division, is simple and easy, by appropriating to the Inhibiter so much of the common Fund, taken out of the first End of the Price, as will be sufficient for his Payment: For though the Inhibition itself does not intitle the Inhibiter either

either to be ranked, or to draw any Part of the Price, until he has attached the Estate by Adjudications, or otherways, yet, when that is done, his Adjudication draws back to the Date of his Inhibition, and gives him a Preference to the whole Creditors, whose Debts are posterior to the Inhibition.

And, upon the same Principles, the same Rule of Ranking and Preference must obtain, where the inhibiting Debts are prior to some, and posterior to others of the Annualrenters, the prior Annualrenters, whose Debts are not struck at by the Inhibition, will be ranked *primo loco*, then the inhibiting Creditors, then the posterior Annualrenters, according to the Dates of their respective Infeftments.

And upon the same Principles, as the inhibiting Creditors can only draw by virtue of their Inhibitions, in so far as they can qualify Loss or Prejudice by means of the Debts contracted posterior to their Inhibition, the Case may so happen, that the Debts, contracted posterior to the Inhibition, will draw a Proportion of the Price corresponding to their Debts, in right of their *pari passu* Preference with the other Annualrenters, whose Debts are not affected by the Inhibition, when, at the same time, the inhibiting Creditors will draw nothing; as, for Example, where some of the Debts which are not affected by the Inhibition, are sufficient to exhaust the whole Price, without leaving any Part thereof for the inhibiting Debts, and that the posterior Creditors, whose Debts would otherways be struck at by the Inhibition, are, by the Nature of their Securities, intitled to come in *pari passu* with the other Creditors, whose Debts are not struck at by the Inhibition, and whose Securities, or Diligences, are sufficient to cover the whole Estate.

One obvious Example of this occurs in the Case of Adjudications, all within Year and Day, who, in the Ranking amongst themselves, are intitled to come in *pari passu*. For, though some of the Debts upon which these Adjudications

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are obtained, may be of Date posterior to the Inhibition, yet if the other Adjudications, against which the Inhibition does not strike, are sufficient to exhaust the whole Price, so as to leave nothing for the inhibiting Debt, the inhibiting Creditor must be set totally aside, because the Adjudications, which are not struck at by the Inhibition, are sufficient to exhaust the whole Price, and the whole adjudging Creditors must rank amongst themselves, as if there had been no Inhibition in the Case; the Inhibiter can reap no Advantage from the posterior Contractions; there is no Fund for his Payment, independent of these, and the adjudging Creditors, in the Ranking amongst themselves, can take no Benefit from the Inhibition.

These were the Principles which weighed with your Lordships to give Judgment as above in the Ranking of the Creditors of *Whitehaugh*; and as that Rule was established with great Deliberation, after a most laborious Search into former Precedents and Practice; which, in so far as the contrary Rule had been followed in particular Rankings, was found to be absolutely erroneous, without any proper Authority, other than the Whim or Fancy of the Accountant in making out the Scheme of Division, it is believed your Lordships will not be easily induced to overturn that Rule, which, upon the Authority of that solemn Decision, has been uniformly followed in all the Rankings that have since occurred.

But as this Rule is now again called in question, in making out the Scheme of Division of the Price of the Estate of *Langton*; and as the Lord Ordinary has been prevailed with to take the Point to report, it is necessary to state to your Lordships such of the Arguments as are now again insisted upon for overturning this Rule, in so far as these are not already sufficiently obviated.

The first Objection is founded upon the Stile or Words of the Letters of Inhibition, as importing an absolute Prohibition to the inhibited Person, and the whole Lieges to contract

tract with the Person so inhibited; and therefore as the whole Debts, contracted posterior to the Inhibition, are said to be all in *pari casu*, as *spreta auctoritate* of the Injunction thereby published, and consequently to be all equally struck at by the Inhibition, and equally reducible at the Inhibitor's Instance, the Consequence drawn from these Premises is, that the Inhibitor falls to be ranked as a Burden upon all the posterior Annualrenters, whose Debts are equally struck at by his Inhibition, and to draw his Payment from them equally and proportionally.

But it is submitted to your Lordships, that the Principle itself upon which this Objection is founded, as well as the Consequences grafted thereon, are entirely fallacious. The Will of the Inhibition imports no absolute Prohibition, either against the inhibited Person or the Lieges in general, against contracting of Debts, but in so far as by these posterior Contractions, the inhibiting Debt may be hurt or prejudged. The Injunction therefore is not simple and absolute, but qualified: The Inhibitor has no further Interest but to secure Payment of his own Debt: The posterior Creditors are in Safety to lend their Money with the Risk of that Preference which the Inhibition has secured to the inhibiting Debt; and as the Inhibitor, by means of his Preference, is intitled to draw his Payment out of the first and readiest of the common Fund, what remains of the Price is the Fund of Division among the other Creditors, who, in the Competition amongst themselves, must be ranked as if there had been no Inhibition in the Case. The Inhibition affords but a Claim of Damages in respect of any supposed Prejudice done to him by the posterior Contractions, and where there is no Damage there can be no Prejudice; and consequently the Will of the Inhibition is not *spreta*, where, in all Events, the Inhibiter draws his full Payment.

2dly, It is alledged that the Reduction, *ex capite inhibitionis*, is similar in this respect to a Reduction upon the Act 1621, both

both of them calculated to prevent the Debtor from alienating his Estate to the Prejudice of the prior Debt upon which Diligence had been done.

The Analogy between the two Cases is admitted to be just, but the Question still remains, What the legal Consequence is in respect of the Debts contracted posterior to such Diligence. The Objection seems to suppose, that it founds the Creditor who had used the Diligence in a Title to challenge and reduce *simpliciter* the posterior Contractions. But this is plainly begging of the Question. Neither the one nor the other can go further than to secure Payment of the Debt upon which the Diligence is led: That End being attained, the prohibitory Diligence can operate no further, not even to the User of the Diligence himself, far less to third Parties in the Competition or Ranking amongst them.

It is therefore, with all due Submission, an Abuse of Words, to say, that an Inhibition founds the Inhibiter in a Challenge or total Reduction of Deeds granted, or Debts contracted posterior thereto. A Challenge of this Kind, though brought in the Form of a Reduction, *ex capite inhibitionis*, is in Reality no other than a Declarator, that, notwithstanding of the posterior Alienation or Contraction, the Inhibiter should have Access to affect the Lands, in the same Manner as if these posterior Deeds had not been granted, or Debts contracted. It is a Challenge personal to the Inhibiter only, which therefore can never go further than his Interest is concerned: As to all other Purposes and Effects, the posterior Deed or Debt stands upon its own Footing, as if no such Inhibition had been used. Nor is any third Party intitled to avail himself of the Inhibition. And so this Point was ruled in the Case of *Hay contra Lady Ballegerno*, 7th January 1680, where the Pursuer's Title, though reduced *ex capite inhibitionis*, was found to be a good Title in a Reduction and Improbation of all real Rights affecting the Debtor's Estate, other than that upon which the Inhibition followed, which could be founded on by none

none but those who had Right to the Sum upon which the Inhibition followed.

And the like Judgment was given in the Case of Lady Borthwick, contra Ker, 26th January 1636, and other Cases therein referred to, where the Judgment of the Court was, " That
 " a Reduction at a prior Creditor's Instance, *ex capite inhibi-*
 " *tionis*, did not hinder the Defender from using his Insest-
 " ment against all others who could pretend no Right to that
 " Inhibition."

3dly, To evince the Impropriety of this Rule, it was said, that in many Cases it would be attended with very great Injustice; for that, suppose the Case of two Annualrenters, the first of these only struck at by the Inhibition, and the Fund insufficient for all their Payment, if the Inhibiter should be ranked *primo loco*, and thereafter the Annualrenters in their Order, this Absurdity would follow, that the second Annualrenter, who is not struck at by the Inhibition, would be cut out, and the first Annualrenter, though struck at by the Inhibition, would draw his whole Sum.

But with all due Deference, the supposed Absurdity does not apply to the Rule itself, but to the Misapplication thereof. The Inhibitor can never be entitled to a *primo loco* Preference, but where his Inhibition is prior to the whole Annualrenters. If some are prior, and some posterior to the Inhibition, the Inhibiter must draw his Payment out of that Part of the Price which would be allotted to the Annualrenter struck at by his Inhibition; but amongst the Annualrenters themselves, the Ranking and Division would still proceed as if there was no Inhibition in the Case.

4thly, As a further Illustration of the Absurdity of this Rule, the Objectors are pleased to insist, that supposing the Debtor, after Inhibition, to alienate different Parcels of his Lands, by so many different Conveyances, it could not be a Question, but that the inhibiting Creditor would be entitled to reduce any one of these Alienations he thought proper, and to take himself to that Part of his Debtor's Estate for his Payment.

The Principle may safely be admitted, with this Qualification, that before the Inhibiter could reduce, *cum effectu*, any one of these posterior Alienations, so as to operate his Payment out of that Part of the Debtor's Estate, he behoved to adjudge the same, as till then the Reduction could have no Effect. But the Application of this Principle, to the Case in hand, is not so obvious; for the Question now at Issue, respects the Case where all the Creditors have their Security upon one and the same Subject, whereby the first Annualrenter is as much preferable to the posterior Annualrenters, as the inhibiting Adjudger is to the whole Annualrenters, which can never apply to the Case of different Sales of different Parts of the Estate, to different Purchasers, where the Purchasers have no Connection with one another. And if any particular Purchaser, by Means thereof, suffers Prejudice by the supervening Adjudication of his Purchase, at the Instance of the Inhibiter, he has himself to blame, who, seeing the Inhibition upon Record, and consequently, knowing that his Purchase was liable to Reduction, at the Inhibiter's Instance, did not secure himself against that Hazard, either by retaining the Price till the Inhibition was purged, or by real Warrandice upon the rest of the Debtor's Estate.

But this will not apply to the Case of Annualrenters having all and each of them the like Securities upon their Debtor's Estate. The Inhibiter has no Title or Interest, in such Case, to pick out any one of these Annualrenters, and to insist in a Reduction thereof, as in Defraud and Prejudice of his Inhibition. His Adjudication founds his Preference to the whole Annualrenters struck at by the Inhibition, so as to entitle him to draw his Payment out of the first and readiest of the whole Fund. He cannot challenge any one of the Annualrenters to any other Purpose or Effect, and whether he challenges all or one of them to that Effect, these Annualrenters in the Competition amongst themselves, will be ranked, and draw as if there were no Inhibition in the Case, or as affecting such of their Interests only, against which the Inhibition strikes,

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where the Inhibition interveens between the prior and posterior Annualrenters.

5thly, It is said, that as from the Principles above laid down, the first Annualrent-right is reduceable, as granted *spreta auctoritate*, it can be no Bar to that Reduction, that the Debtor has transgressed once and again, by granting so many more Annualrent-rights.

This is, in Effect, but a Repetition of the first Objection, though in different Words; to which, therefore, the former Answer is repeated, *viz.* That the Prohibition is not simple and absolute, but conditional and qualified, *viz.* to do no Deed to the Prejudice of the inhibiting Debt; and no Prejudice is done, when the inhibiting Creditor has a sure Fund for his Payment.

The Objection would suppose, that as the whole Annualrenters are equally stripped by his Inhibition, and as the Inhibiter is Master of his own Diligence, and may use it against some, and not against others, or in whole or in part, as he pleases, and as such Annualrent-right is liable to Reduction at his Instance, it is optional for him to extend his Challenge against every Annualrenter, so far only as to oblige him to repeat a proportional Part of the Debt corresponding to his Annualrent, whereby equal Justice will be done to all the Annualrenters, who being all in *pari casu*, from their having counteracted the Will of the Letters of Inhibition, can with no Reason complain, when the Inhibiter takes his Payment proportionally from each.

But the whole of this Argument proceeds upon the Principles already refuted, as considering the Annualrents to be liable to a total Reduction, *ex capite inhibitionis*, farther than as the Inhibiter could qualify Prejudice thereby, or that the Annualrenters in the Ranking amongst themselves, could take any Advantage from the Inhibition.

Where the Annualrenters are all in *pari casu*, and one Catholick Insestment preferable to the whole, it would be emulous in that Creditor to take his Payment from any one Annualrenter,

annualrenter, when the whole Estate is subject to his Payment. Equity there interposes, either to oblige him to take his Payment proportionally for the whole, or to assign.

But where the other Creditors have all the like Security, preferable amongst themselves, according to the Priority of their Infestment, there are not *termini habiles* for the Inhibitors picking out any one of the Annualrents, to be the Fund of his Payment. He takes his Money off the first End, farther than that he has no Concern; and the Residue is divided amongst the other Creditors, according to their Preferences amongst themselves; and no Equity can intitle the Annualrenter last infest, to draw any Share of the Price, so long as the Debts due to the prior Annualrenters, are unsatisfied, in whole or in part.

It is this Principle of Equity, whereby the Catholick Creditor having his Security over different Tenements, equally subject to his Payment, if he chooses to take his whole Payment out of one Tenement, he must assign to those Creditors who have the secondary Infestments upon that Tenement, to the end they may operate their proportional Relief against the other Tenements, because in that Case these secondary Creditors upon the different Tenements, have no Preference to one another; each is preferable *secundo loco* upon his own Tenement. But this will never apply to the Case of Creditors having all their Securities upon the same Subject, but which are preferable to one another in a certain Order; so that each may be said to have only the Reversion of what remains, after Payment of the more preferable Creditors.

These seem to be the capital Arguments, upon which the Objection is founded. It may probably be enforced by several other curious Cases, which will puzzle and perplex, rather than illustrate. But as the Principles above laid down will, it is hoped, be sufficient to confirm the Rule established by the above recited Judgment, in the Case of *Whitehaugh*, it is hoped, your Lordships will effectually silence any Doubt upon this Point, by repeating the like Judgment in this Case.

In respect whereof, &c.

ALEX. LOCKHART.

